No. 94-1247

In the Supreme Court of the United States

OCTOBER TERM, 1994

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HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Petitioner
v.
PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

NIGHTTIME CONCEPTS, INC.,
Petitioner,
v.
PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

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On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The brief of the government of Pennsylvania is most significant for what it leaves undisputed. The government apparently agrees that no court other than the Supreme

Court of Pennsylvania has relied on the Twenty-first Amendment to eliminate all First Amendment protection for advertisers of alcohol beverages. Nor does the government dispute that the Pennsylvania Court's "reasonable relation" test lies at one extreme of an irreconcilable array of tests applied by the federal and state courts to governmental restrictions on alcohol beverage advertising. The government also does not question the importance of the question presented by this petition—the unresolved tension between two amendments to the federal Constitution. Nor does the government dispute that truthful price advertising, such as that banned by Section 4-498, Pa. Stat. Ann. tit. 47, § 4-498 (1969 & Supp. 1994), is at the heart of the commercial speech doctrine. Thus, this case is entirely appropriate for a grant of *certiorari* from this Court.

Instead of explaining why this petition should be denied, the government anticipates briefing on the merits by offering three erroneous arguments to justify the Pennsylvania Court's unprecedented decision: (i) that its "reasonable relation" test for judging restrictions on commercial speech is required by this Court's decisions in *California v. LaRue*, 409 U.S. 109 (1972) ("*LaRue*"), *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) ("*Bellanca*"), and *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92 (1986) ("*Iacobucci*"); (ii) that these cases are controlled by this Court's summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982) ("*Queensgate*"); and (iii) that the Pennsylvania Court's "reasonable relation" test is actually no different than the *Central Hudson* test as it has been applied by other lower courts to restrictions on alcohol beverage advertising. These arguments, which purportedly support the Pennsylvania Court's radical decision to deprive an entire industry of First Amendment protection, should be addressed by this Court through the granting of this petition.

REPLY TO RESPONDENT'S ARGUMENTS

I. THE PENNSYLVANIA COURT'S UNDULY EXPANSIVE READING OF *LaRUE, ET AL.* IS IN CONFLICT WITH EVERY OTHER RELEVANT DECISION

In the government's erroneous view, the Pennsylvania Court's decision to strip petitioners' truthful commercial speech concerning alcohol beverages of all First Amendment protection follows directly from *LaRue, Bellanca* and *Iacobucci* ("*LaRue, et al.*"). Brief in Opp. at 7. But *LaRue, et al.* set forth a single, narrow exception to this Court's Twenty-first Amendment jurisprudence where States restrict marginal expressive conduct in the form of sexual entertainment on premises licensed to sell alcohol. *See* Petition at 15. The Pennsylvania Court stands alone in reading *LaRue, et al.* as elevating the Twenty-first Amendment into a supremacy clause for the States.

According to the government, "*LaRue, et al.* make it clear that the presumptive effect of the Twenty-first Amendment extends to *any and all* reasonable liquor regulations." Brief in Opp. at 9 (emphasis supplied). This Court, however, consistently has rejected arguments that the Twenty-first Amendment qualifies individual constitutional rights in the area of alcohol regulation. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (First Amendment establishment clause rights); *Craig v. Boren*, 429 U.S. 190, 207 (1976) (equal protection rights); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process rights); *see 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987) ("The States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution."); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Quite understandably, not one of the foregoing authorities appears in the government's brief.

Although the other lower courts disagree about the precedential value of *LaRue, et al.* (*see* Petition at 16-

17), no court shares the Pennsylvania Court's extreme view that those decisions require application of a "reasonable relation" test to all regulations in the so-called "liquor area." Brief in Opp. at 8. Indeed, every other lower court that has reviewed a restriction on alcohol beverage advertising—and every one cited by the government—has purported to apply the *Central Hudson* test. *See 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3518 (U.S. Dec. 27, 1994) (No. 94-1140); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227 (E.D.N.Y. 1993); *Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen.*, 370 N.W.2d 328 (Mich. Ct. App. 1985), *appeal denied*, 424 Mich. 878, *cert. denied*, 479 U.S. 939 (1986) ("*Michigan Beer*"); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Queensgate*, 433 N.E.2d 138; *Wise v. Tennessee Alco. Bev. Comm'n*, No. 81-325-1 (Tenn. Ct. App. Apr. 13, 1982), App., *infra*, 98a-109a.

Because no other court concurs with the Pennsylvania Court's interpretation of *LaRue, et al.*, the government's reliance on those decisions is unavailing. Rather than justify the Pennsylvania Court's decision, the government instead has underscored the need for this Court to resolve the conflicting applications of *LaRue, et al.* by the lower courts.

II. THIS COURT'S SUMMARY DISMISSAL IN *QUEENSGATE* DOES NOT SUPPORT THE PENNSYLVANIA COURT'S DECISION

In another attempt to place the Pennsylvania Court's decision within the mainstream of relevant constitutional precedent, the government argues that the issue presented in these cases already has been decided by this Court in its summary dismissal in *Queensgate*. But *Queensgate*

has no precedential effect here and was not even relied on by the Pennsylvania Court.

Summary dismissals "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Thus, this Court's summary dismissal in *Queensgate* cannot support the Pennsylvania Court's creation of a completely new test for reviewing governmental restrictions on alcohol beverage advertising. Rather, the summary dismissal must be read as consistent with the then-established principle that the Twenty-first Amendment does not "qualif[y] individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Craig v. Boren*, 429 U.S. at 206.

Further, the precedential effect of summary dismissals is limited to "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. at 176. Both the constitutional and the factual issues presented in *Queensgate* distinguish it from these cases. In *Queensgate*, the constitutional question only concerned whether *Central Hudson* had been applied properly. 433 N.E.2d at 141-42. Here, the principal constitutional question is whether the Twenty-first Amendment mandates that a "reasonable relation" test, rather than *Central Hudson*, applies when a government restricts commercial speech that concerns alcohol beverages. Unlike the questions presented here, the jurisdictional statement in *Queensgate* did not even mention the Twenty-first Amendment. Brief in Opp. at 13-14.

The summary dismissal in *Queensgate* also has no precedential impact here because it arose from significantly different facts. The government is simply wrong in stating that both *Queensgate* and these cases involve "a liquor regulation prohibiting license holders from advertising in any medium the price of any alcohol beverages offered for sale." Brief in Opp. at 15. Although

that is a reasonably accurate description of Pennsylvania's Section 4-498, the challenged regulation in *Queensgate* expressly *permitted* price advertising in virtually every advertising medium unless it referred to "price advantage." *Queensgate*, 433 N.E.2d at 139 n.1. Further, unlike these cases, the factual record in *Queensgate* did not contain unequivocal concessions by the government that alcohol beverage price advertising does *not* cause increased consumption. *See Report to the Pennsylvania Liquor Control Board on Beer Price Advertising* (Pa. Commw. Office of Att'y Gen. Antitrust Section, July 31, 1985) ("Attorney General's Report"), App., *infra*, 50a; Order Adopting Regulations (Pa. Liquor Cont. Bd., Sept. 4, 1985) ("Liquor Board Order"), App., *infra*, 78a.[1] Because *Queensgate* did not present the "precise issues" as presented in these cases, this Court's summary dismissal does not support the Pennsylvania Court's decision to deprive petitioners' truthful price advertising of First Amendment protection. *See Mandel v. Bradley*, 432 U.S. at 176-77.

Even if *Queensgate* were on point, that would not compel denial of this petition. A summary dismissal does not have the same precedential value for the Supreme Court as does a decision rendered after full briefing and argument. *Metromedia, Inc. v. City of San Diego*, 453

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[1] Respondent tries hard to disavow the conclusions regarding price advertising reached by Pennsylvania's Attorney General and its Liquor Control Board. First, respondent argues that those entities are not really part of Pennsylvania's "government," because they are separate from the Pennsylvania legislature. Brief in Opp. at 5-6. The length to which respondent must stretch to make this untenable argument reveals its understandable concern about these two documents.

Second, respondent repeatedly and mistakenly protests that the Attorney General's Report and the Liquor Board Order cannot be considered by this Court because they were not made part of the record below. Brief in Opp. at 5-6, 6 n.3, 11 n.6. To the contrary, the record below contains a lengthy discussion of the Attorney General's Report and its conclusions. *See* Petition at 5 n.4. Further, both documents may be considered as part of the legislative history of Section 4-498's precursor regulation.

U.S. 490, 500 (1981). "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476-77 n.20 (1979). To the extent that there is any ambiguity concerning the meaning of the summary dismissal in *Queensgate*, then that is another matter that should be clarified by the granting of this petition. *See Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (recognizing that three prior summary affirmances had precedential value on the issue at bar, but nonetheless granting the petition so as to "fully explore and treat" the issue, and ultimately disapproving of the prior summary affirmances).

III. THE GOVERNMENT CANNOT HARMONIZE EITHER THE PENNSYLVANIA COURT'S "REASONABLE RELATION" TEST OR ITS UPHOLDING OF SECTION 4-498 WITH THIS COURT'S *CENTRAL HUDSON* TEST

The government incorrectly asserts that this petition need not be granted because there are only "slight differences" between the Pennsylvania Court's "reasonable relation" test—which as applied in these cases is no more than a "rational basis" test—and the intermediate scrutiny of *Central Hudson*. Brief in Opp. at 18. But, in a recent decision ignored by the government, this Court explicitly has "rejected mere rational basis review" in judging restrictions on commercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993) (*"Discovery Network"*). Further, in two additional decisions that are inexplicably absent from the government's brief, this Court has made plain that *Central Hudson* requires much more than a "rational basis" showing, by emphasizing the heavy burden on the government to come forward with specific evidence and the independent role of the judiciary in reviewing that evidence. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2086-89 (1994) (*"Ibanez"*);

Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993) ("*Edenfield*").

Nonetheless, the government mistakenly insists that the Pennsylvania Court's decision does not conflict with other cases involving restrictions on alcohol beverage advertising because—regardless of the test applied—they all have upheld the challenged regulation. The government's survey of the cases is wrong because it ignores three decisions that have struck down such restrictions as impermissible under the First Amendment. *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 2671 (1994); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227; *Michigan Beer*, 370 N.W. 2d 328.[2]

More importantly, the government's result-driven analysis of the cases is irrelevant because courts must decide each commercial speech case on its own record. If the Pennsylvania Court had applied the appropriate level of scrutiny—intermediate—to the record in these cases, it could not possibly have found that the government satisfied its burden of proof under *Central Hudson* because (i) the government submitted no evidence to show that the banning of price advertising will directly and materially reduce excessive consumption, App., *infra*, 12a, and in fact reached a contrary conlusion in the Attorney General's Report and the Liquor Board Order, *id.* at 51a, 78a, (ii) the government submitted no evidence to demonstrate that its ban is no more restrictive than necessary to achieve its asserted interest, *id.* at 13a, and again reached a contrary conclusion in the Attorney General's Report, *id.* at 57a-58a, (iii) substantial evidence appears in the legislative history that Section 4-498 actually was

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[2] The government mischaracterizes *Michigan Beer* as not having been decided by a state court of last resort. Brief in Opp. at 17. The Michigan Court of Appeals was the court of last resort because the Michigan Supreme Court denied leave to appeal the decision. 424 Mich. 878; *see Matthews v. Huwe*, 269 U.S. 262, 265 (1925).

passed for the improper purpose of putting large beer discounters out of business, *id.* at 89a, 91a, and (iv) the government—which is the exclusive seller of wine and spirits for off-premise consumption—omits its own advertising from the ban.[3]

The government concludes its brief by making one last attempt to square the Pennsylvania Court's unprecedented decision to abandon *Central Hudson* with the conflicting decisions of the other lower courts. According to the government, the lower courts apparently have been disingenuous when purporting to apply *Central Hudson*, because they in fact have been basing their decisions "on the theory that a state's power to totally ban the sale of alcohol includes the lesser power to dampen demand by placing restrictions on advertising." Brief in Opp. at 19-20. As the government notes, that theory is actually a restatement of dictum from *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986) ("*Posadas*"). But that much criticized[4]

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[3] Confronted with the inconsistency in Pennsylvania's statutory scheme, respondent—the entity responsible for enforcing the Liquor Code—suggests, but studiously avoids concluding, that Section 4-498 also might ban price advertising by the Liquor Control Board. Brief in Opp. at 2 n.2. But the "Board" is a defined term in the Liquor Code, Pa. Stat. Ann. tit. 47 § 1-102 (1969 & Supp. 1994), and the Pennsylvania legislature demonstrates in other sections of the Code that it knows how to include the Board in the list of entities banned from certain activities, *see id.* at § 4-493(1) (prohibiting the Board from furnishing alcohol beverages to certain persons), (3) (prohibiting the Board from exchanging alcohol beverages for merchandise), (24) (prohibiting the Board from offering things of value as an inducement to purchase alcohol beverages). In contrast, Section 4-498 does not include the Board among the entities banned from price advertising.

[4] *See, e.g., Posadas*, 478 U.S. at 355 n.4 (Brennan, J., dissenting); Philip B. Kurland, *Posadas de P.R. v. Tourism Co.: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 Sup. Ct. Rev. 1, 12-17; Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (May 1990).

dictum has *never* been relied on by any court (including the *Posadas* Court) to supplant application of *Central Hudson*, and it is at odds with this Court's subsequent commercial speech decisions, which emphasize independent judicial review of the government's evidence. *See, e.g., Ibanez*, 114 S. Ct. 2084; *Edenfield*, 113 S. Ct. 1792; *Discovery Network*, 113 S. Ct. 1505. Indeed, this Court recently declined to rule on the basis of the *Posadas* dictum in *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993). Nonetheless, if the government is correct that certain lower courts have adopted *sub silentio* the *Posadas* dictum as the law, then clarification of that dictum's significance provides yet another reason why this petition should be granted.

CONCLUSION

The petition should be granted.

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